IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.46 OF 2005

Mahanagar Telehpone Nigam Ltd. ... Petitioners

v/s

Traco Cable Co.Ltd. ... Respondents

Ms Shah i/b M/s S.I. Shah and Co. for Petitioners.

Mr Sanjay Udeshi i/b M/s Sanjay Udeshi and Co. for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 3RD OCTOBER 2005.

P.C. :-

1. By this petition, the petitioners challenge the award made by the Sole Arbitrator directing the petitioners to pay certain amount to the respondents with interest. The entire amount directed to be paid is on account of reimbursement of the sales tax paid by the respondents. An admitted position is that there were two purchase orders received by the petitioners through the respondents, one dated 15th November 1996 and the other dated 19th February 1997. Both the purchase orders contained a clear condition that the price of the goods is inclusive of all the taxes. It means that liability to pay all taxes is that of the respondents. Admittedly, pursuant to these purchase orders, supply was made. It appears that the respondents had represented that this condition that the price is inclusive of taxes including sales tax is contrary to the general terms of the contract agreed between the respondents and the petitioners and the Department of Telecommunication should amend it and either the petitioners should be directed to issue 'C' form or take over the liability of the respondents to pay the amount of sales tax. The amendment in that regard was incidentally issued but within a week of that amendment, it was cancelled. The case of the petitioners before

the Arbitrator was that the claim made by the respondents is clearly contrary to the terms of the purchase orders and therefore, the respondents were not justified in demanding the amount of sales tax. Perusal of the award shows that the Arbitrator has held that the term int he contract that the price is inclusive of all taxes is contrary to the general terms of the contract arrived at between the respondents and the Department of Telecommunication and therefore that term was not binding and the Arbitrator has therefore held that the petitioners are liable to pay the amount of sales tax. It is pertinent to note that the Arbitrator has also relied on the amendment of the term issued by the petitioners and its cancellation thereof within a week. The Arbitrator has also noted that the entire supply was completed by the respondents before the term was amended. The submission of the learned counsel appearing for petitioners is that the petitioners who were purchasers of the goods were entitled to modify the purchase orders and provide the term on which it wants to purchase the goods. The purchase orders were accepted by the respondents and the goods were supplied and therefore, the respondents were not claiming any amount contrary to the terms of the purchase orders. According to the learned counsel, the finding recorded by the Arbitrator that because the term included in the contract regarding payment of sales tax was contrary to

the tender document, it was not permissible for the petitioners - M.T.N.L. to impose that condition. In the submission of the learned counsel, if the term was not acceptable to the respondents, the respondents were free to decline supply of the goods and once the purchase orders are accepted and supply is made, the respondents could not claim any amount contrary to the terms for the purchase orders. The learned counsel appearing for respondents, on the other hand, submitted that the tenders were invited by the Department of Telecommunication and the contract was arrived at as per the terms of the tender document. The purchase orders were placed by the petitioners with the respondents pursuant to the contract arrived at between the parties and therefore, the petitioners could not have imposed a condition which was at variance with the tender document. The learned counsel submits that the respondents made the supply though the term in the purchase orders was not acceptable to the respondents because the product was specially manufactured for the petitioners. After having gone through the record and after having heard learned counsel for petitioners, I find that the reasons given by the learned Arbitrator for making the award are perverse, to say the least. The learned Arbitrator failed to see that there was a clear condition contained in the purchase orders that liability to pay sales tax will be that of the

respondents. The respondents accepted the purchase orders and made supply of the goods. If the condition was not acceptable to the respondents, it could have declined to make any supply and if they had manufactured the product because of any representation made to them by the Department of Telecommunication, their remedy was sue the Department for damages, but after having made the supply pursuant to the purchase orders, which contained a clear term that the sales tax would be payable by the respondents, the respondents could not turn around and claim the amount of sales tax. I do not find anything in the award or even in the record which will even indicate that there was any prohibition contained, either administrative or legal, preventing the petitioners from placing the purchase orders with the respondents which are at variance with the terms of the tender. If it is the case of the respondents that they had agreed to make the supply only on the terms contained in the tender document, then the respondents could have refused to make the supply on finding that the purchase orders contained a term which is at variance with the terms contained in the tender document, but once having accepted the purchase orders and made the supply, a clear estoppel operated against the respondents from claiming the amount. I find that there was no justification whatsoever for the Arbitrator to hold that the petitioners are liable to pay the

amount of sales tax contrary to the terms of the purchase orders. in the result therefore, petition succeeds and is allowed, the award impugned is set aside. The respondents are directed to pay cost of this petition to the petitioners as incurred by the petitioners.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.